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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DIEGO ALFARACHE,

Petitioner,

v.

RICHARD CRAVENER, District Director US INS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Attorney General erred as a matter of law in *Matter of Soriano*, Interim Decision #3289 (BIA 1996, AG 1997), in applying § 440(d) of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (Apr. 24, 1996) ("AEDPA"), retroactively in order to bar Mr. Alfarache relief from deportation under § 212(c) of the Immigration and Nationality Act, as amended, ("INA"), 8 U.S.C. § 1182(c).

2. Whether the retroactive denial of the opportunity to seek relief under INA § 212(c) to Mr. Alfarache violates the Due Process Clause of the Constitution.

3. Whether the disparate rulings from the various federal circuit courts violates Petitioner's right to equal protection of the law.

LIST OF PARTIES

Petitioner, Appellant below, is Mr. Diego Alfarache.

Respondents, Appellees below, are Mr. Richard Cravener, District Director of the United States Immigration and Naturalization Service in his official capacity and the Immigration and Naturalization Service, as an agency of the federal government.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Mr. Diego Alfarache, by and through his attorneys, Simon Azar-Farr & Associates, P.C., respectfully prays that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on February 22, 2000.

OPINION BELOW

In a reported opinion dated February 22, 2000, the United States Court of Appeals for the Fifth Circuit denied Mr. Alfarache's appeal. *Alfarache v. Cravener*, 203 F.3d 381 (5th Cir. 2000) (No. 99-20437). The Fifth Circuit ruled that the district court did have jurisdiction under the transitional rules to consider Mr. Alfarache's claims. But on the merits, the Fifth Circuit affirmed the district court's ruling dismissing Petitioner's claims.

JURISDICTION

The judgment and opinion of the court of appeals was entered on February 22, 2000. This petition is filed within 90 days of that entry of judgment, pursuant to Sup. Ct. R. 13.1. The Supreme Court has jurisdiction under Title 28 U.S.C. § 1254, which states that "cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATEMENT OF THE CASE

A. Statement Of Facts

Diego Alfarache is a native and citizen of Mexico, who entered the United States lawfully as an A-2 non-immigrant on or about 1974 at the tender age of six. He grew up in Houston, Texas, and moved to Austin, Texas in 1986 to attend the University of Texas. He adjusted status to that of a lawful permanent resident on December 7, 1990.

On August 19, 1994, Mr. Alfarache was convicted of "Conspiracy to Participate in a Racketeering Enterprise" under Title 18, § 1962(d) of the U.S. Code. He was sentenced to imprisonment for 48 months but he was released after serving only 42 months.

At the time of his conviction, Mr. Alfarache was not considered as one convicted of an "aggravated felony" under the provisions of the Immigration and Nationality Act. The category of "aggravated felony" created by the Anti-Drug Abuse Act of 1988, as a new ground of deportability for certain enumerated criminal offenses, originally only included (i) murder; (ii) any drug trafficking crime as defined in § 924(c) of Title 18, or Section 102 of the Controlled Substances Act, and (iii) any illicit trafficking in firearms or destructive devices as defined in § 921 of Title 18 of the U.S.C.

Then, the Immigration and Nationality Act of 1990 (IMMACT) expanded the definition to include money laundering under 18 U.S.C. § 1956; any crime of violence as defined under 18 U.S.C. § 16 for which the term of imprisonment imposed is at least five years; and any attempt or conspiracy to commit these acts. IMMACT

provided that these definitions apply to offenses committed on or after November 29, 1990.

The Immigration and Nationality Technical Corrections Act (INTCA) of 1994 further broadened the definition of aggravated felony to include, among others, certain offenses relating to the RICO Act (Racketeer Influenced and Corrupt Organizations Act). The expanded definition was expressly made to apply only to convictions entered on or after the INTCA's enactment date of October 25, 1994.

Mr. Alfarache's conviction was entered before October 25, 1994. Neither at the time it was entered nor at the time of the commission of the offense, did Mr. Alfarache's conviction satisfy the definition of one convicted of an "aggravated felony".

Since his release, Mr. Alfarache's conduct has been faultless. Currently, he works as a computer programmer for a software company in Austin. Because of his exemplary behavior, and for being a "minor player" in the conspiracy, the Government approached him in 1996 to be a material witness against Samuel Posada Rios, the kingpin of an international drug organization operating between Medellin, Columbia and Houston. This organization is "the most violent organization that has operated in Houston," according to the FBI special agent who investigated the case and testified in Mr. Alfarache's behalf in the proceedings before the immigration court. It is responsible for at least twenty homicides, so far as the government is aware, some of which involved members of the organization itself. At least one high-ranking member of the organization is reputed to be a member of the Mexican federal police. The Government prosecutors wrote a letter to the immigration court stating that the

organization Mr. Alfarache testified against is documented to be violent and retaliatory, and that Mr. Alfarache's testimony was highlighted in a front page article of the Metropolitan section of the Houston Chronicle. The Government asked that Mr. Alfarache not be deported for at least a year.

Mr. Alfarache was placed in deportation proceedings on or about September 26, 1995, when the Immigration and Naturalization Service issued an Order to Show Cause why he should not be deported. During the pendency of the deportation proceedings, the Immigration and Nationality Act (the Act) was amended twice: On April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) was enacted, and on September 30, 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) was enacted. These changes to the INA altered Mr. Alfarache's situation after the fact and resulted not only in his deportability but also denial of relief from deportation – issues that are discussed at length below.

The immigration judge ruled that Mr. Alfarache was subject to deportation for having been convicted of a violation of any law or regulation relating to a controlled substance, and for having been convicted of an aggravated felony as defined under § 1101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43), even though the Order to Show Cause failed to state what subparagraph of § 1101(a)(43) was violated. Other charges in the Order to Show Cause were not sustained.

Further, Mr. Alfarache's request for relief from deportation under § 212(c) [8 U.S.C. § 1182(c)] of the Act, filed on March 26, 1998, was denied on the ground of statutory ineligibility, and his application for withholding of

deportation was also similarly denied. The immigration judge ruled that, under the amendments brought about by the AEDPA and the IIRAIRA, Mr. Alfarache was deemed to have been convicted of an aggravated felony regardless of the date of the conviction, and he was denied any further relief.

Mr. Alfarache's timely appeal to the Board of Immigration Appeals was dismissed in its decision dated January 4, 1999, which stated that § 321 of IIRAIRA expanded the scope of the definition of an aggravated felony to apply regardless of whether the conviction was entered before, on or after the enactment of IIRAIRA, that § 440(d) of the AEDPA rendered Mr. Alfarache statutorily ineligible for consideration of 212(c) relief from deportation, and that as one convicted of an "aggravated felony" under the expanded definition, Mr. Alfarache was also deemed to have been convicted of a "particularly serious crime" and thus ineligible for withholding of deportation.

On January 26, 1999, Mr. Alfarache filed a petition for habeas corpus before the United States District Court for the Southern District of Texas. The District Court granted the Government's motion for summary judgment, and in accordance therewith, dismissed Mr. Alfarache's petition on April 26, 1999. On May 4, 1999, Mr. Alfarache timely filed his Notice of Appeal with the United States Court of Appeals for the Fifth Circuit. In a reported decision dated February 22, 2000, the Fifth Circuit denied Mr. Alfarache's appeal. This timely petition then followed.

B. Statement Of Jurisdiction Of The Court Of First Instance

Petitioner, Mr. Alfarache, filed an application for a writ of habeas corpus with the United States District

Court for the Southern District of Texas which had jurisdiction under Title 28 U.S.C. § 2241. The United States Court of Appeals for the Fifth Circuit exercised jurisdiction under Title 28 U.S.C. § 2241 and the not-codified § 309(c)(4) of the Illegal Immigration Reform and Immigration Responsibility Act of 1996, Div. C., Department of Defense Appropriations Act, Pub. L. 104-208, (Sept. 30, 1996), 110 Stat. 3009 (as amended by Pub. L. 104-302, § 2 (Oct. 11, 1996), 110 Stat. 3656).

REASONS FOR GRANTING THE PETITION

A. Unlawful Retroactive Application Of The AEDPA § 440(d)

Lawful permanent residents convicted of a crime making them deportable have long had the right to seek a waiver of deportation under § 212(c) of the Act, 8 U.S.C. § 1182(c), so long as they had a "lawful unrelinquished domicile of seven consecutive years in the United States." 8 U.S.C. § 1182(c) (added by Immigration and Nationality Act of 1952).[1] A lawful permanent resident of the United States, like Mr. Alfarache, convicted of a crime triggering deportability could thus be assured that, even if he pled guilty or was otherwise convicted in criminal proceedings, a waiver of deportation could be sought in subsequent deportation proceedings before an immigration

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[1] See also *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) (holding that § 1182(c) relief is available in deportation as well as in exclusion proceedings); *Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976) adopting and applying *Francis'* holding nationwide); and *Ghassan v. INS*, 972 F.2d 631 (5th Cir. 1992).

judge.[2] Given the significant time that Mr. Alfarache has spent in the United States, the early age that his residence began, and his investment in education and community life in the United States, Mr. Alfarache had concluded at the time of his plea and conviction that he was not only statutorily eligible for – but also would likely be granted relief from – deportation under § 212(c). Indeed, even at the time of the institution of the deportation proceedings, Mr. Alfarache was eligible for relief under § 212(c).

Congress enacted AEDPA on April 24, 1996. Subsection 440(d) of AEDPA provided that relief under § 1182(c) was no longer available to any alien who "is deportable by reason of having committed any criminal offense covered in" INA §§ 241(a)(2)(A)(iii) [aggravated felonies] and 241(a)(2)(B)(i) [controlled substance offense]. Mr. Alfarache was found deportable pursuant to these provisions.

Congress did not designate AEDPA § 440(d) as one of the sections that "shall apply" in cases triggered by pre-AEDPA conduct or events. Indeed, it removed language calling for § 440(d)'s retroactive application that had been included in the original Senate version of the legislation.

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[2] Among the favorable factors considered by an Immigration Judge under S 212(c) are family ties within the United States; residence of long duration in this country (particularly when the inception of residence occurred at a young age); evidence of hardship to the individual and family if deportation were to occur; service in this country's armed forces; a history of employment; existence of property or business ties; evidence of value and service to the community; proof of genuine rehabilitation; and other evidence attesting to an individual's good character. See generally *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978).

Nevertheless, immediately after AEDPA's enactment, the INS began urging that § 440(d) should be applied in *all* pending and subsequently initiated deportation cases, regardless of whether the conduct or events triggering the § 440(d) restrictions pre-dated the date of enactment of AEDPA. Two months after AEDPA's enactment, the INS' position was rejected by the Board in *Matter of Soriano*, Interim Decision #3289 (BIA June 27, 1996). In that decision, the Board held that § 440(d) may not be applied retroactively to a lawful permanent resident who applied for § 212(c) relief before AEDPA's enactment on April 24, 1996. *Id.*

The INS sought review of the Board's decision by the Attorney General. Without first hearing from the opposing party or the *amici* who had appeared before the Board, the Attorney General summarily vacated the Board's decision on September 12, 1996. See *Majico v. Reno* and *Navas v. Reno*, 970 F. Supp. 130 at 144 (E.D.N.Y. July 11, 1997).

Five months later, the Attorney General issued a written opinion in *Matter of Soriano*, Interim Decision #3289 (A.G. 1997). The Attorney General concluded that AEDPA § 440(d) should be applied retroactively to all § 212(c) waiver cases even in cases where § 440(d) was triggered by events prior to the date of enactment of AEDPA. Finding that "nothing in the language of the newly enacted statute, AEDPA § 440(d), specifies either that it is to be applied in pending proceedings, or that it is not to be," the Attorney General declined to apply the traditional presumption against retroactive application of statutes. The Attorney General stated that application of § 440(d) in cases based on pre-AEDPA criminal conduct or convictions does not have retroactive effect. Thus,

under the Attorney General's position, lawful permanent residents, many with relatively minor convictions, are now subject to automatic deportation even if the triggering conduct and conviction took place years or decades ago.

Mr. Alfarache is an example of a lawful permanent resident of the United States who, under the Attorney General's view, is now barred from seeking relief from deportation based on conduct and a conviction predating AEDPA. Had he had the opportunity to apply for a waiver, his application for relief would most likely have been granted as a matter of discretion. He has substantial ties to this country, but he was never given the opportunity to present his ties to this country to an immigration judge. In the succeeding pages, Mr. Alfarache contends that § 440(d) of AEDPA may not be applied retroactively to conduct or events, in this case his conviction that pre-dated the date of enactment of AEDPA.

1. Normal rules of statutory construction establish that Congress did not intend that AEDPA § 440(d) be applied in cases where the conduct or events triggering the subsection's provisions pre-dated AEDPA.

In its 1994 decision in *Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994), the Supreme Court explained the process for determining to which cases a new statute will apply. *Id.* at 263-80. "When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280. Only where Congress has not done so is there need to resort to *Landgraf's*

judicial default rules and apply the traditional presumption against retroactivity if a court determines that a statute would have retroactive effect. In short, "where the Congressional intent is clear, it governs." *Landgraf* at 264.[3] In *Lindh*, the Supreme Court said that such a reading of *Landgraf*, (which was adopted by the Attorney General in *Matter of Soriano*), "ignores context." *Id.* As the Court stated: "Although *Landgraf*'s default rule would deny application when a retroactive effect would otherwise result, other construction rules may apply to remove even the possibility of retroactivity (as by rendering the statutory provision wholly inapplicable to a particular case). . . . " *Id. Lindh* thus proceeded to consider the statutory language and context, as well as the legislative history, in order to determine Congress' intent concerning the temporal reach of a statute. Finding evidence of prospective intent, the Court found no need to resort to *Landgraf*'s judicial default rules. In contrast, in *Matter of Soriano*, the Attorney General engaged in no analysis of the text, structure, or legislative history of the Act before launching into an application of *Landgraf*'s judicial default rules.

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[3] See also *Lindh v. Murphy*, 117 S.Ct. 2059, 2063 (1997) (rejecting the interpretation of *Landgraf* that "there are only two alternative sources of rules to determine [a statute's] ultimate temporal reach: either an 'express command' from Congress or application of our *Landgraf* default rule").

2. Congress plainly expressed its decision not to make AEDPA § 440(d) applicable to pre-AEDPA conduct or events and that Congressional intent must govern.

In the absence of any contrary effective date provision, § 440(d) of AEDPA came into effect on the date of enactment of the Act. That does not, however, answer the question of whether § 440(d) may be applied to pre-AEDPA conduct or events. As the Supreme Court observed, "[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Landgraf*, 511 U.S. at 257. Accordingly, in the absence of an express statutory provision clearly delineating the temporal reach of § 440(d) of AEDPA, this Court must proceed with an analysis of the plain language and legislative history of the statute to resolve the issue of retroactive application.

a. Plain language

The plain language of AEDPA's Title IV immigration provisions read as a whole, and against the backdrop of the decision in *Landgraf*, shows that Congress did not intend § 440(d) to apply retroactively. In *Landgraf*, after reviewing the ancient roots and history of the traditional presumption against retroactive legislation, the Court reaffirmed the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." *Landgraf*, 511 U.S. at 265. The Court concluded that "prospectivity remains the appropriate default rule." *Id.* at 272. A presumption against retroactivity "assured that Congress itself has

affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits," thereby "allocat[ing] to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes." *Id.* at 272-73. The Court noted that this judicial default rule serves to "giv[e] legislators a predictable background rule against which to legislate." *Id.*

In sum, "[t]he fact that Congress chose to impose some forms of [retroactivity], but not others, indicates a deliberate congressional choice with which the courts should not interfere." See *Central Bank v. First Interstate Bank*, 511 U.S. 164, 184 (1994). "Obviously, then, when Congress wished to provide [for retroactive application], it knew how to do so and did so expressly." See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1970). Because Congress chose here not to provide for retroactive application for AEDPA § 440(d), the Attorney General was incorrect as a matter of law in applying it retroactively.

b. Legislative History

If the plain language of AEDPA's Title IV immigration provisions read as a whole were not enough to determine conclusively that § 440(d) is not applicable retroactively, the legislative history removes any doubt that this is the correct interpretation. That history shows that the original Senate version of the bill that became AEDPA contained language making § 440(d) applicable retroactively, but that this language was dropped after House-Senate Conference.

The restriction on § 212(c) relief that became § 440(d) of AEDPA had been introduced in Congress a year earlier

by Senators Dole and Hatch as part of a group of immigration provisions that they included in an amendment of their own proposed Senate bill S. 735, entitled the "Comprehensive Terrorism Prevention Act of 1995." See 141 Cong. Rec. S. 7553 (May 25, 1995 – Legislative Day of May 15, 1995). At that time, the section including the provision that later became AEDPA § 440(d) specified: "The amendments made by this section shall take effect on the date of enactment of this Act and shall apply to cases pending *before, on, or after* such date of enactment." See 141 Cong. Rec. at S. 7559 (emphasis added by Petitioner). On June 7, 1995, the Senate adopted the provision and the language of retroactive applicability when it passed S. 735. See 141 Cong. Rec. at S. 7863 (June 7, 1995); 141 Cong. Rec. D. 691 (June 7, 1995).

The House meanwhile had adopted its own provision in H.R. 2703, the House's version of the legislation that later became AEDPA. The House bill limited § 212(c) relief in a less restrictive way and did not include language making the restriction applicable retroactively. See 142 Cong. Rec. at 2295 (March 14, 1996). When the House took up consideration of S. 735 on March 14, 1996, the House amended the Senate version by replacing the Senate text with the text of its own H.R. 2703. See 142 Cong. Rec. H. 2288. The House then asked for a conference with the Senate, insisting on the House amendments. *Id.* at H. 2304.

One month later, after the House-Senate conference, the Senate's restrictions on § 212(c) relief remained in the legislation coming out of the conference committee, but the language of retroactive application had been

dropped. See 142 Cong. Rec. H. 3323 (April 15, 1996).[4] The Senate's restriction on § 202(c) relief, without any accompanying language of retroactive applicability, then became § 440(d) of AEDPA, as passed by Congress and signed by the President on April 24, 1996.

3. If any doubt exists as to whether Congress had plainly expressed its decision not to make AEDPA § 440(d) applicable to pre-AEDPA conduct or events, such doubt must be evaluated under the longstanding rule of construing any lingering ambiguities in deportation statutes in favor of the alien.

The Supreme Court has repeatedly held that any ambiguities in immigration statutes must be read to avoid deportation consequences. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (referring to "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien").[5]

The Supreme Court has applied this principle to issues relating to the temporal reach of deportation legislation, finding that "[I]n the absence of a clear and definite expression, we are not at liberty to conclude that Congress intended that any alien, no matter how long a resident of this country, or however well disposed toward our Government, must be deported, if at any time in the

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[4] See also Conference Committee Report, 142 Cong. Rec. H. 3333, 3335 (expressly adopting § 303(e) of the Senate bill containing limitations on § 1182(c) relief but not adopting § 303(f) containing the provision for retroactivity).

[5] The Board has recognized this rule. See *Matter of St. John*, Interim Decision #3295 (BIA 1996). *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (interpreting the statute in the "narrowest" possible way because deportation is a drastic consequence).

past, no matter when, or under what circumstances, or for what time, he was a member of the described organization." *Kessler v. Strecker*, 307 U.S. 22, 30 (1939) (interpreting the statute providing for deportability based on membership in a subversive organization). In short, this rule of statutory construction counsels that any lingering doubts regarding the temporal reach of § 440(d) of AEDPA should and must be resolved in favor of Mr. Alfarache.

4. Even were it decided that Congress did not provide that AEDPA § 440(d) is inapplicable in cases where the triggering conduct or events pre-dated AEDPA, the judicial default rules enunciated by the Supreme Court in *Landgraf* require that § 440(d) not be applied to Petitioner.

As noted earlier, the first step in determining to which cases a new statute will apply is to ascertain "whether Congress has expressly prescribed the statute's proper reach." See *Landgraf*, 511 U.S. at 280. If Congress has done so, as may be determined by normal rules of statutory construction, the analysis is over; "there is no need to resort to judicial default rules." *Id.*; see *Lindh v. Murphy*, 117 S.Ct. at 2062. For the reasons set forth earlier, that is the situation in this case. However, if this Court should reach a different conclusion, it must then consider the judicial default rules set forth by the Supreme Court in *Landgraf*.

a. AEDPA § 440(d) has retroactive effect and therefore implicates the *Landgraf* presumption against retroactivity.

Under *Landgraf*'s judicial default rules, "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269-70. If the court determines that the new law attaches such new legal consequences, i.e., has retroactive effect, then it applies the "traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment," *id.* at 278, and the new law is held inapplicable to such pre-AEDPA conduct unless a "clear congressional intent" to ordain such retroactive application appears. *Id.* at 280. Conversely, if the court determines that the new statute would have new legal consequences constituting "genuinely 'retroactive' effect," a presumption arises in favor of applying the statute to pre-AEDPA events; but this presumption may be overcome by a showing of " 'manifest injustice or [that] there is statutory direction or legislative history to the contrary.'" *Id.* at 277. "The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 270.

The Attorney General's interpretation of AEDPA § 440(d) as eliminating the right of individuals such as Mr. Alfarache to pursue § 212(c) relief based on past criminal conduct and convictions unmistakably "takes away" a right or "attaches a new disability" in respect to

past events.[6] Past conduct and convictions operate to eliminate a previously held right to apply and be considered for relief from deportation. Viewed another way, past conduct and convictions vitiate a defense to deportation. In this case, Mr. Alfarache pled guilty and agreed to the conviction on the belief that he would be able to assert a defense to deportation under § 212(c). As the Attorney General's decision in *Matter of Soriano* noted, "[a] successful applicant for relief under § 212(c) will not . . . be deported from the country, even though his or her past criminal convictions would otherwise lead to deportation." See *Matter of Soriano*, Interim Decision #3289 at 5.

b. The Attorney General's arguments against application of the *Landgraf* presumption against retroactivity have no merit.

There is no merit to the Attorney General's assertion that the *Landgraf* presumption against retroactivity has no applicability to these cases because a § 212(c) application should be viewed as a prospective injunction that is properly governed by the law in effect at the time the injunction is issued. See *Matter of Soriano*, at 5. The reality here is that AEDPA § 440(d) effects a drastic change in the law relating to the immigration consequences for Mr. Alfarache, a lawful permanent resident with considerable ties to this country. By taking away the substantive right to apply for a waiver of deportation, § 440(d) makes

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[6] See, e.g., *Grodzki v. Reno*, 950 F. Supp. 339 (N.D. Ga. 1996) (conviction and release from prison occurred over 8 years before enactment of AEDPA); *Montero v. Cobb*, 937 F. Supp. 88 (D. Mass. 1996) (conviction and release from prison occurred over 12 years earlier).

deportation automatic for him. Clearly, the Attorney General's application of § 440(d) to pre-AEDPA conduct and convictions must be seen as retroactively affecting the calculus of risks and relevant rights connected with the conduct, or with the choices made during the past criminal proceedings, and thus must be seen as attaching a new and unfair legal consequence to such past conduct and choices.[7]

c. The Attorney General's opinion in *Matter of Soriano* is not entitled to any special deference.

The decision of the Attorney General in *Matter of Soriano* is not entitled to deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, the first question in interpreting a statute is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If the answer is yes, there is no need to proceed to consider the agency's interpretation. *Id.* Where the agency's opinion is not based on statutory construction but rather on interpretation of judicial default rules, deference is wholly inappropriate. *Akins v. Federal Election Commission*, 101 F.3d 731 (D.C. Cir. 1996) (en banc) (rejecting *Chevron* deference for agency interpretation of Supreme Court construction of statute: "[a]gencies have no special qualifications or legitimacy in interpreting Court opinions"). In this case, the Attorney General has reached her own interpretation of

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[7] Even were it determine that there is no retroactive effect, the evidence of "statutory direction" and legislative history arguing against retroactive application still overcomes any presumption in favor of applying AEDPA § 440(d) to pre-AEDPA events. *Landgraf*, 511 U.S. at 277.

what this Court's *Landgraf* default rules stand for. Her interpretation of those default rules and this Court's opinion in *Landgraf*, contrary to an interpretation of statute is entrusted to her, is not entitled to deference.

5. The Attorney General's retroactive application of AEDPA § 440(d) in cases where the triggering conduct or events pre-dated AEDPA violates due process requirements by imposing retroactivity of a statute without any rational basis.

The Supreme Court cautioned in *Landgraf* that the interest in avoiding the adjudication of constitutional questions also counsels against the retroactive application of a new statutory provision. *Landgraf*, 511 U.S. at 279 n.31. The Due Process Clause "protects the interest in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application." *Id.* at 265. Like any piece of legislation, legislation with retroactive characteristics must meet the basic due process requirement of being "supported by a legitimate legislative purpose furthered by a rational means." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Legislation that operates retroactively must further be supported by an independent rationale for the ways in which the statute operates retroactively. *Id.* at 730. A purpose that supports a law's prospective characteristics is not sufficient. *Id.* Indeed, the constitutionality of retroactive legislation is "conditioned upon a rationality requirement beyond that applied to other legislation." See *Bowen v. Georgetown University Hospital*, 488 U.S. 233 (1992) (Scalia, J., concurring).

In this case, the statute read as a whole, demonstrates that Congress did not even intend retroactive application. In any event, Congress certainly offered no purpose for any intended retroactive application of AEDPA § 440(d). The prospective scheme created by AEDPA bears little relationship to the way the law works when applied retroactively. Applied prospectively, AEDPA serves to provide notice of the severe and certain deportation consequences that will flow from any of the crimes enumerated in § 440(d). When applied retroactively, the statute works instead to upset and frustrate settled expectations based on a justifiable reliance.

B. Petitioner's Case Involves An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By The Supreme Court; The Various Federal Circuits Have Reached Conflicting Results On The Issue Presented In This Case, And The Fifth Circuit's Decision In This Case Does Not Conform With *Landgraf*.

Mr. Alfarache's petition for writ of certiorari squarely falls into the reasons the Court uses for granting a writ of certiorari as explained in Supreme Court Rule 10(c), in that "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this court." U.S.C. Supreme Ct. R. 10(c). The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law, that is, whether the retroactive application of a statute that denies the opportunity for discretionary relief from deportation violates the alien's right to due process. This issue has not been settled by the Supreme Court, but

should be, because several Circuit Courts have rendered conflicting opinions on the topic. The decision by the Fifth Circuit in Mr. Alfarache's appeal sets forth a belief that "'pre-AEDPA convictions can trigger AEDPA § 440(d),' at least when an application for INA § 212(c) relief was not pending on the date that AEDPA took effect." *Alfarache v. Cravener*, 203 F.3d 381 (5th Cir. 2000). In other words, it would appear the Fifth Circuit believes that AEDPA acts retroactively to deny relief under INA § 212(c) unless an application for such relief was already pending at the time AEDPA was enacted. Other Circuits, including the Seventh, have found the cut-off date to be arbitrary, and are more concerned with whether reliance on an opportunity for relief played into an alien's plea decision.

1. An alien may plead guilty to a deportable offense for a variety of reasons after considering all possible consequences of the plea, including reliance on availability of relief from deportation.

The issue of an alien's reliance is clearly explained by the Court of Appeals for the First Circuit in *Wallace v. Reno*, 194 F.3d 279 (1st Cir. 1999). The First Circuit explained that "wherever an alien pled guilty prior to AEDPA, the alien might have relied on the availability of a waiver, and so the broadened AEDPA waiver ban should never apply in such a case." *Wallace* at 287. The Eleventh Circuit expressed identical sentiments with their decision in *Alanis-Bustamante v. Reno*, 201 F.3d 1303 (11th Cir. 2000). The Eleventh Circuit, agreeing with the First Circuit, stated that "the alien's perspective is the relevant one for determining when a proceeding commences for

purposes of deciding which statutory rules apply." *Alanis-Bustamante* at 1309. Quoting *Wallace*, the Eleventh Circuit Court said:

> "[W]e are not concerned with the INS's internal time tables, starting points, due dates, and the like but with the judicial question of retroactivity. This question turns on considerations unrelated to the purpose of INS regulations – primarily . . . with the evil Congress sought to prevent and the realities of reasonable reliance or settled expectations on the part of litigants." *Id.*

This is exactly the sentiment Mr. Alfarache asserts in this appeal. Mr. Alfarache contends that he considered all possible consequences when he entered his guilty plea. This is when reasonable reliance attached, and when his settled expectations were couched. If, for example, an offer for leniency was given in exchange for a guilty plea and additional testimony, then the party pleading guilty has acted based on that justifiable reliance and that reliance should be honored.

2. Cut-off dates set by the agency are arbitrary, and the reliance interests of the aliens involved are the key factor in determining whether § 440(d) should be retroactively applied.

The Seventh Circuit recently visited the issue of agency's arbitrary cut-off dates in *Morales-Ramirez v. Reno*, 2000 WL 375430 (7th Cir. Ill.) (not yet reported in F.3d). There, the Seventh Circuit agreed with the proposition that 440(d) should not be applied to "pending" proceedings, and that determination of whether proceedings were actually pending should be based on the reliance interests of aliens involved in the process. *See Morales-*

Ramirez at 5. The court reasoned that " . . . the relevant inquiry lay not in when proceedings actually commenced, but when the reliance interests of aliens should be considered for the purposes of determining whether § 440(d) should be retroactively applied." *Id.* AEDPA § 440(d) did not even exist when Mr. Alfarache committed his criminal offense. It also did not exist when Mr. Alfarache agreed to plead guilty. If § 440(d) were in effect, Mr. Alfarache could have considered the substantial consequences AEDPA added to his actions, and in particular the lack of any defense to deportation and he would have acted accordingly. Mr. Alfarache's substantial reliance came into being at the time he pled guilty and was convicted. He agreed to the plea in part upon the justifiable expectation that he had a defense to deportation under § 212(c) and that he would likely be granted relief from deportation.

The Seventh Circuit clarified the questions behind retroactive application of AEDPA through a hypothetical they posited in *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998). It hypothesized:

> "[s]uppose a person facing deportation conceded deportability in reliance on having a good shot at a waiver of deportability. In that event, to abolish such waiver for his class of deportees after he had relied by forgoing a challenge to deportability would pull the rug out from under him. And in that case we have held that the abolition would not apply to him . . . " *LaGuerre* at 1041.

Reiterating this belief in their decision in *Turkhan v. Perryman*, 188 F.3d 814 (7th Cir. 1999), the Seventh Circuit went on to say that "[t]he subsequent change in the law effected by AEDPA § 440(d), therefore, might turn a strategic

decision to forego a defense to deportability in favor of an application for discretionary relief into a mousetrap, leaving the alien with no judicial recourse." *Turkhan* at 827. The Seventh Circuit goes on the clarify that these considerations should apply to aliens seeking waiver of deportation under § 212(c) that had a colorable defense to deportability. *Id.* This is clearly the situation for Mr. Alfarache, as his application for relief pursuant to § 212(c) was denied without proper consideration because AEDPA eliminated this form of relief. Actual consideration of the 212(c) application will reveal that Mr. Alfarache did indeed have a "colorable defense" to deportability. The Seventh Circuit also gives the alternative, stating "if a criminal alien does not have at least a colorable defense to deportability, then he has lost nothing by conceding deportability and applying AEDPA § 440(d) retroactively to his pending application for a discretionary waiver of deportation under INA § 212(c) does not violate due process." *Turkhan* at 827. Under the circumstances of this case, the denial of an opportunity to seek a waiver of deportation under § 212(c) for Mr. Alfarache who undoubtedly had a colorable defense to deportation means that his right to due process of law has been violated.

In *Wallace*, the First Circuit stated their belief that their "decision leaves open the question whether and when AEDPA § 440(d)'s new ban on waivers applies to cases in which the alien pled guilty to the crime before AEDPA's enactment date but a deportation proceeding had not yet begun." *Wallace* at 287. Interestingly, the First Circuit states their hope that the question would be answered with "new guidance from the Supreme Court." *Id.*

C. Violation Of The Equal Protection Clause

Mr. Alfarache contends that the denial of his eligibility to seek relief under INA § 212(c), 8 U.S.C. § 1182(c), violates his right to equal protection of the law under the Constitution's Equal Protection Clause because the denial of relief to him treats similarly situated classes of aliens differently without a rational basis to a legitimate governmental interest. See *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), and its progeny including the Fifth Circuit's decision in *Ghassan v. INS*, 972 F.2d 631 (5th Cir. 1992). The basis for Mr. Alfarache's contention lies in the difficult-to-justify truth that resident aliens in the various federal circuits are given different opportunities to apply for a waiver of deportation.

1. Mr. Alfarache's right to equal protection has been violated because there is no rational basis for distinguishing between excludable and deportable aliens.

The departure point for Mr. Alfarache's equal protection challenge is *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) and the Fifth Circuit's decision in *Ghassan v. INS*, 972 F.2d 631 (5th Cir. 1992). Francis, convicted of criminal possession of marijuana, was charged with deportability under INA § 241(a)(11) (conviction for a drug-related offense). *Francis*, 532 F.2d at 269. He sought but was denied relief under INA § 212(c) by the Board on the ground that he was placed in deportation proceedings, and therefore was deportable rather than excludable. *Id.* at 270. Had he been placed in exclusion proceedings and charged with excludability for the same criminal conviction, Francis would have been statutorily eligible for relief under § 212(c). *Id.*

After reviewing the statutory and judicial history of § 212(c), the Second Circuit in *Francis* held that the Board's interpretation of INA § 212(c) violated the Constitution's Equal Protection Clause because it treated lawful permanent residents of this country who engage in comparable conduct differently based on whether the lawful permanent resident was in exclusion proceedings as opposed to deportation proceedings. Specifically, the Second Circuit held that the distinction set forth in INA § 212(c) between excludable and deportable classes of aliens, otherwise similarly situated, lacked any basis rationally related to a legitimate governmental interest, and, therefore, deprived aliens who were deportable for the same conduct as those who were excludable by the equal protection of the law. *Id.* at 272-73. Instead of striking down § 212(c) as unconstitutional, however, the Second Circuit remanded the case to the Board so that Francis could also be considered for relief under § 212(c). *Id.* at 273. On remand, the Board chose to adopt the decision of the Second Circuit on a nationwide basis. *Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976).

In this case, Mr. Alfarache's right to equal protection of the laws was violated because of the Board of Immigration Appeals' decision in *Matter of Fuentes-Campos*, Interim Decision #3318 (BIA 1997), which Mr. Alfarache contends treats two similarly situated classes of aliens differently without a rational relation to a legitimate governmental interest.

2. Mr. Alfarache's right to equal protection is violated because the different federal circuits apply § 440(d) of AEDPA differently; Depending within which federal circuit an alien resides, such an alien may or may not be eligible for relief under § 212(c), thereby creating lack of uniformity in the application of this country's immigration laws.

a. Different Circuit Courts have applied the principles of *Landgraf* with different results.

In *Reno v. Goncalves*, the Supreme Court denied the government's petition for certiorari from the First Circuit's decision. 114 F.3d 110 (1998). Raul Percira Goncalves was convicted for his crimes prior to the enactment of AEDPA. He sought 212(c) waiver of deportation, but his application was dismissed based on the opinion of the Attorney General in *Matter of Soriano*, Interim Decision #3289 (BIA June 27, 1996). The First Circuit Court of Appeals held that the Attorney General's application of the new AEDPA restrictions took away a form of relief that, while discretionary, was plainly substantive, and so implicated the presumption against retroactivity set forth in *Landgraf*.[8]

The Second Circuit had occasion to address the issue of retroactively denying the opportunity for relief with cases that involved 212(c) applications filed subsequent to the enactment of AEDPA. In the joined cases of *Henderson v. INS*, No. 97-4050, *Majico v. Reno*, No. 97-2599, *Navas v. Reno*, No. 97-2600, and *Yesil v. Reno*, No. 97-2629, 157 F.3d 106 (1998), the Second Circuit also concluded that

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[8] *Landgraf v. USI Film Products*, 511 U.S. 244, 266.

§ 440(d) of AEDPA is inapplicable to aliens in deportation proceedings prior to its enactment.

Henderson was a long-time permanent resident convicted of a controlled substance violation and charged with deportability under § 241(a)(2)(B)(i) of the Act under proceedings commenced in February 1994. Pending the outcome of his case, AEDPA was enacted and based on the *Soriano* opinion by the Attorney General, the Board reversed the waiver of deportation initially granted to him. Mojica was also a long-time permanent resident convicted prior to the enactment of AEDPA,[9] His application for 212(c) relief was also submitted after the enactment of AEDPA. The immigration judge found Mojica ineligible for relief and ordered him deported. On appeal, the Second Circuit held "like the First Circuit in *Goncalves v. Reno*, 144 F.3d at 126, we reject the Attorney General's position and hold that § 440(d) does not apply to cases initiated before the date of its enactment."

Courts in the Ninth Circuit have also expressed a willingness to apply the principles of *Landgraf* to prevent the retroactive application of AEDPA § 440(d), for example in their decision in *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999). The Ninth Circuit stated their belief that "[t]he question of whether AEDPA applies to deportation proceedings pending at the time of enactment has mostly been settled by other circuits, who have concluded that it does not." *Magana-Pizano* at 610. They go on to make reference to cases from the First, Second, Third, Sixth,

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[9] Mojica was convicted in 1988 for conspiracy to distribute cocaine, but did not make his 212(c) application until he was targeted for deportation in May of 1996.

Eighth and Eleventh Circuits.[10] In certain circumstances all of these circuits allow for 212(c) relief in spite of AEDPA. Unfortunately for Mr. Alfarache, the Fifth Circuit has not made the same interpretation of the same statute.

b. Since the Circuit Courts are applying the statutes differently, guidance from the Supreme Court is warranted.

The First, Second, Third, Sixth, Eighth, Ninth and Eleventh Circuits have all held that under certain circumstances, resident aliens in Mr. Alfarache's position can be granted discretionary relief from deportation under § 212(c). The Fifth Circuit, however, the Circuit within which Mr. Alfarache resides, does not allow for any form of relief under § 212 (c) for a person in Mr. Alfarache's position, because it has chosen to employ a different interpretation of the retroactive effect of AEDPA § 440(d). The fact of the matter is that Mr. Alfarache is not allowed to apply for discretionary relief from deportation simply because of where he lives in the United States, while if he simply lived elsewhere in this country, he would have had the opportunity to apply for discretionary relief under different interpretations of the same statutes by the other federal circuit courts. This disparate treatment of similarly situated aliens runs afoul of the right to equal protection of the law. The federal circuit courts have frequently visited the question of how § 440(d) affects

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[10] See *Wallace v. Reno*, 194 F.3d 279, 287 (1st Cir. 1999); *Pak v. Reno*, 196 F.3d 666, 673-74 (6th Cir. 1999); *Mayers v. U.S. Dept. of INS*, 175 F.3d 1289, 1301-04 (11th Cir. 1999); *Sandoval v. Reno*, 166 F.3d 225, 242 (3d Cir. 1999); *Henderson v. INS* et al., 157 F.3d 106, 129-30 (2d Cir. 1998); see also *Shah v. Reno*, 184 F.3d 719, 724 (8th Cir. 1999)

aliens like Mr. Alfarache, and what has resulted is confusing and unequal application of the statute. All are looking to the Supreme Court for guidance to eliminate confusion.

CONCLUSION

The Fifth Circuit's retroactive application of AEDPA § 440(d) impermissibly denies Mr. Alfarache the possibility of discretionary relief from deportation, and violates this Court's holding in *Landgraf* which directs against retroactive application. The Circuit Courts are at odds regarding the issue of how to apply AEDPA § 440(d) to people in Mr. Alfarache's position and the lack of uniformity among the Circuits runs afoul of Alfarache's right to equal protection of the law. For the foregoing reasons, Mr. Alfarache respectfully prays that this Court grant his petition for a writ of certiorari so that his eligibility for relief from deportation may be reviewed.

Dated: May 9, 2000, and

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 99-20437

DIEGO ALFARACHE,

Petitioner-Appellant,

versus

RICHARD CRAVENER, District Director, Houston District, Immigration and Naturalization Service

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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(Filed Febr. 22, 2000)

Before GARWOOD, WIENER, and DENNIS, Circuit Judges.

PER CURIAM:

The Immigration and Naturalization Service ("INS") brought deportation proceedings against Petitioner-Appellant Diego Alfarache, charging that he was subject to deportation for, *inter alia*, having been convicted of an aggravated felony and a controlled substance offense. The immigration judge ("IJ") ordered that Alfarache be deported and the Board of Immigration Appeals ("BIA") dismissed Alfarche's appeal. Alfarache then brought the

instant habeas corpus action under 28 U.S.C. § 2241, collaterally attacking the deportation order.

The INS argues that the district court erred when it exercised jurisdiction over Alfarache's habeas petition. Recently, in *Requena-Rodriguez v. Pasquarell,*[1] we considered the INS's arguments on this point. *Requena-Rodriguez* is factually indistinguishable from the instant proceeding in all material respects. In that case we concluded that "§ 2241 habeas jurisdiction remains in transitional cases where [8 U.S.C. 1 § 1252(g) does not apply,"[2] The INS concedes that this case is governed by the transitional rules and that 8 U.S.C. § 1252(g) does not apply. It necessarily follows from our *Requena-Rodriguez* decision, then, that the district court had jurisdiction over Alfarache's § 2241 habeas corpus petition, and we so hold.

On the merits, Alfarache makes four arguments. First, he contends that both the IJ and the BIA erred when they concluded that § 440(d) of the Antiterrorism and Effective Death Penalty Act ("AEDPA") – a provision that limits the Attorney General's discretion to grant relief from deportation pursuant to § 212(c) of the Immigration and Nationality Act ("INA") – applies to convictions (like his) that predated the enactment of EDPA. We considered and rejected the same argument in *Requena-Rodriques.*[3] There we held that "pre-AEDPA convictions can trigger AEDPA § 440(d)," at least when an application for INA

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[1] 190 F.3d 299 (5th Cir. 1999).

[2] *Requena-Rodriquez v. Pasquarell,* 190 F.3d 299, 306 (5th Cir. 1999).

[3] 190 F.3d at 307-08.

§ 212(c) relief was not pending on the date that AEDPA took effect.[4] Alfarache filed his application for discretionary relief under INA § 212(c) after the effective date of AEDPA. In accordance with out decision in *Requena-Rodriquez*, we hold that AEDPA § 440(d) prohibits Alfarache's seeking discretionary relief from deportation under INA § 212(c).

Second, Alfarache argues that if AEDPA § 440(d) applies to prisoners who were convicted prior to the effective date of AEDPA (as we have held), then the statute violates his right to equal protection. AEDPA § 440(d) added a sentence to INA § 212(c) that prevents the attorney general from affording discretionary relief to aliens in deportation proceedings; the amendment does not apply, however, to aliens in exclusion proceedings. Alfarache argues that there is no rational basis on which to distinguish between aliens in deportation proceedings and those in exclusion proceedings. We considered and rejected the same argument in *Requena-Rodriquez*. There we explained that:

> Congress's more lenient treatment of excludable as distinct from deportable aliens . . . creates an incentive for deportable aliens to leave the country – which is after all the goal of deportation – without their having to be ordered to leave at the government's expense. To induce their voluntary departure, a little carrot is dangled before them, consisting of the opportunity to seek a waiver should they seek to return to

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[4] *Id.* at 307.

> the country and by doing so trigger exclusion proceedings.[5]

In *Requena-Rodriquez* we concluded that this was a "facially legitimate and bona fide reason," and that it defeats the petitioner's equal protection argument.[6] It defeats Alfarache's equal protection argument for the same reason.

Third, Alfarache argues that applying AEDPA § 440(d) to preclude his ability to apply for INA § 212(c) discretionary relief violates his constitutional right to due process. He asserts that this is so because, if the INS had commenced deportation proceedings sooner or if his case had proceeded more expeditiously, then his application for discretionary relief might have been processed before AEDPA § 440(d) took effect.

Unlike a criminal defendant, an alien in deportation proceedings has no constitutional right to a speedy proceeding.[7] Furthermore, the relief to which Alfarache may have been entitled under INA § 212(c) "was couched in conditional and permissive terms. As a piece of legislative grace, it conveyed no rights, it conferred no status."[8] That being so, we hold that there has been no denial of Alfarache's right to due process.

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[5] *Requena-Rodriquez*, 190 F.3d at 309 (*quoting* LaGuerre v. Reno, 164 F.3d 1035, 1041 (7th Cir. 1998)).

[6] *Id.*

[7] *See Doherty v. Thornburgh*, 943 F.2d 204, 209 (2d Cir. 1991); *Prito v. Gluch*, 913 F.2d 1159, 1161 (6th Cir. 1990).

[8] *Cadby v. Savoretti*, 256 F.2d 439, 443 (5th Cir 1958).

Fourth and finally, Alfarache argues that the BIA and the IJ erred when they concluded that he is deportable under INA § 241(a)(2)(A)(iii). This section provides that aliens who have committed "aggravated felonies" are deportable. Alfarache asserts that this section does not apply to him because the offense of which he was convicted, i.e., conspiracy to participate in a racketeering enterprise in violation of 18 U.S.C. § 1962(d), was not an "aggravated felony" as that term was defined in the version of INA § 101(a)(43) that was in effect at the time deportation proceedings were commenced against him.

After the INS initiated deportation proceedings against Alfarache, but before the IJ and the BIA had ruled on his case, the statutory definition of "aggravated felony" was expanded by AEDPA to include "an offense described in [18 U.S.C. § 1962] for which a sentence of one year imprisonment or more may be imposed."[9] AEDPA also inserted the following provision regarding retroactive application: "Notwithstanding any other provision of law (including effective date), the term ["aggravated felony"] applies regardless of whether the conviction was before, on, or after the date of enactment of this paragraph."[10]

Alfarache concedes that he committed such an offense; however, he argues that, because this language evidencing congressional intent that the provision apply retroactively appears in a definitional provision (INA § 101(a)(43)) rather than the provision assigning legal

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[9] INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).

[10] *Id.*

consequences to the definition (INA § 241(a)(2)(A)(iii)), Congress has not expressed its intent that the new definition apply retroactively with sufficient clarity to overcome the presumption against retroactivity. Like the other Courts of Appeals that have considered the question, we hold that the legal consequences that attach to the new definition apply retroactively.[11] The BIA and the IJ were thus correct in their conclusions that Alfarache had been convicted of an aggravated felony.

For the forgoing reasons the summary judgment granted by the district court is in all respects

AFFIRMED.

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[11] *See Ortiz v. INS*, 179 F.3d 1148, 1155-56 (9th Cir. 1999); *Valderrama-Fonseca v. INS*, 116 F.3d 853, 856-57 (9th Cir. 1997); *Choeum v. INS*, 129 F.3d. 29, 36 (1st Cir. 1997). *Accord Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999). In his argument, Alfarache relies primarily on *Lettman v. Reno*, 168 F.3d 463 (11th Cir. 1999) *rehearing granted and opinion vacated in part* 185 F.3d 1216. Although the original opinion in that case did support Alfarache's argument, after Alfarache filed his brief, the Eleventh Circuit granted the government's petition for rehearing and vacated the decision relied on by Alfarache. *See id.*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DIEGO ALFARACHE, Petitioner,	§	CIVIL ACTION NO. H-99-0248
v.	§	
RICHARD CRAVENER, Respondent.	§	

ORDER

(Filed April 27, 1999)

Pending before the court is the Motion of respondent, the Immigration and Naturalization Service (INS) Houston District Director, for Summary Judgment (Docket Entry No. 3). Having carefully reviewed the motion and the opposition of petitioner, Diego Alfarache, the court is persuaded that the motion should be granted because none of petitioner's claims are meritorious. This court already rejected the same equal protection claim in *Olvera v. Reno*, 20 F.Supp.2d 1062, 1065 (S.D. Tex. 1998). The retroactive application of the definition of aggravated felony does not violate the equal protection clause because it is statutorily required by 8 U.S.C. § 1101(a)(43). *Cf. Moosa v. INS*, No. 96-60821, 1999 WL 181836 (5th Cir. Apr. 2, 1999); and *Martins v. INS*, 972 F.2d 657, 659-60 (5th Cir. 1992) (dealing with similar language making it clear that Congress intended amendments to be retroactive). Likewise, petitioner's argument concerning withholding of deportation provides him no basis for habeas relief. *See*

Martins v. INS, 972 F.2d at 660-62. Accordingly, respondent's Motion for Summary Judgment (Docket Entry No. 3) is **GRANTED.**

SIGNED at Houston, Texas, on this 26th day of April, 1999.

/s/ Sim Lake
SIM LAKE
UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
AUG 23 2000
CLERK

(2)

No. 99-1789

In the Supreme Court of the United States

DIEGO ALFARACHE, PETITIONER

v.

RICHARD CRAVENER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, which made aliens convicted of certain criminal offenses ineligible for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994), may be applied to an alien whose conviction predated the enactment of AEDPA.

2. Whether 8 U.S.C. 1182(c) (1994), as amended by Section 440(d) of AEDPA, violates constitutional principles of equal protection because it precludes discretionary relief only for aliens convicted of certain offenses who are placed in deportation proceedings in the United States, and not also aliens convicted of similar crimes who are placed in exclusion proceedings when returning from a trip abroad.

3. Whether the courts of appeals' varying interpretations regarding the temporal scope of Section 440(d) of AEDPA violates constitutional principles of equal protection because aliens are eligible (or ineligible) for discretionary relief from deportation based upon where they reside.

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In the Supreme Court of the United States

No. 99-1789

DIEGO ALFARACHE, PETITIONER

v.

RICHARD CRAVENER, DISTRICT DIRECTOR,
IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 203 F.3d 381. The order of the district court (Pet. App. 7-8) is unreported. The orders of the Board of Immigration Appeals (App., *infra*, 14a-21a) and the immigration judge (App., *infra*, 1a-7a, 8a-13a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 2000. The petition for a writ of certiorari was filed on May 10, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1996, Congress enacted several major changes to the Nation's immigration laws. Those changes were designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation. Two enactments by Congress are pertinent to this case: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (enacted Apr. 24, 1996), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (enacted Sept. 30, 1996).

a. Before the enactment of AEDPA, an alien lawfully admitted for permanent residence who was subject to deportation because of a criminal conviction could apply to the Attorney General for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). To be eligible for such relief, the alien had to show that he had a lawful unrelinquished domicile in this country for seven years, and that, if his conviction was for an "aggravated felony," as defined in the Immigration and Nationality Act (INA), see 8 U.S.C. 1101(a)(43) (1994 & Supp. IV 1998), he had not served a term of imprisonment for that conviction of five years or longer. See 8 U.S.C. 1182(c) (1994).[1]

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[1] Although Section 1182(c) by its terms applied only to aliens who had temporarily proceeded abroad and were returning to their domicile in the United States, it had been interpreted, in response to the Second Circuit's decision in *Francis* v. *INS*, 532 F.2d 268 (1976), also to permit the Attorney General to waive grounds of deportation of lawfully admitted permanent resident aliens who were present in the United States and in deportation proceedings. See *In re Silva*, 16 I. & N. Dec. 26 (B.I.A. 1976); *Gonzalez* v. *INS*, 996 F.2d 804, 806 (6th Cir. 1993); *Ashby* v. *INS*, 961 F.2d 555, 557 &

In 1996, Congress twice restricted the eligibility of criminal aliens for discretionary relief from deportation. First, on April 24, 1996, Congress enacted AEDPA into law. Section 440(d) of AEDPA, 110 Stat. 1277, amended Section 1182(c) to make certain classes of criminal aliens categorically ineligible for discretionary relief from deportation under that Section, including aliens who were deportable because they had been convicted of aggravated felonies or controlled substance offenses. See 8 U.S.C. 1251(a)(2)(A)(iii) and (B)(i) (1994).

Second, on September 30, 1996, Congress enacted IIRIRA, which comprehensively amended the INA. IIRIRA repealed Section 1182(c) on a prospective basis, and replaced it with a new form of discretionary relief known as "cancellation of removal." See IIRIRA § 304(b), 110 Stat. 3009-597; 8 U.S.C. 1229b (Supp. IV 1998). The cancellation of removal provisions, however, were made applicable only to aliens who are placed in removal proceedings on or after April 1, 1997, and therefore do not govern petitioner's case. See IIRIRA § 309(a) and (c)(1), 110 Stat. 3009-625. For deportation proceedings commenced prior to April 1, 1997, including petitioner's case, IIRIRA retained Section 1182(c)—including the amendment made by Section 440(d) of AEDPA that made certain classes of criminal aliens ineligible for relief under Section 1182(c).

b. After the enactment of these changes to the immigration laws, two questions arose in immigration proceedings about the scope of Section 440(d) of AEDPA. First, the question arose as to whether Section 440(d) applies to aliens who were either convicted of the disqualifying offenses or were placed in deportation

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n.2 (5th Cir. 1992); *Tapia-Acuna* v. *INS*, 640 F.2d 223 (9th Cir. 1981).

proceedings based on those offenses before the enactment of AEDPA. On June 27, 1996, the Board of Immigration Appeals (BIA) initially decided that AEDPA Section 440(d) applies to all aliens placed in deportation proceedings before or after AEDPA was enacted, regardless of the date of conviction, except that it should not be applied to aliens who had already filed applications for Section 1182(c) relief before AEDPA's enactment. *In re Soriano*, Int. Dec. No. 3289 (B.I.A. June 27, 1996).

On September 12, 1996, the Attorney General, exercising her authority under 8 C.F.R. 3.1(h), vacated the BIA's opinion in *Soriano* and certified for her decision the question whether AEDPA Section 440(d) applies to applications filed before the date of its enactment. On February 21, 1997, the Attorney General concluded in *Soriano* that Section 440(d) does apply in all deportation proceedings commenced before or after AEDPA's date of enactment, regardless of the date of the alien's conviction, including those proceedings in which aliens had already submitted applications for Section 1182(c) relief as of the date of enactment. *In re Soriano*, Int. Dec. No. 3289 (A.G. Feb. 21, 1997).

Second, the question arose whether AEDPA Section 440(d) bars the Attorney General from granting Section 1182(c) relief to criminal aliens who temporarily proceeded abroad, seek admission to the United States, and are placed in exclusion proceedings, as well as to criminal aliens in the United States who are placed in deportation proceedings. The BIA concluded in *In re Fuentes-Campos*, Int. Dec. No. 3318 (May 14, 1997), and *In re Gonzalez- Camarillo*, Int. Dec. No. 3320 (June 19, 1997), that AEDPA Section 440(d) bars relief only for criminal aliens placed in deportation proceedings in the United States.

2. Petitioner is a native and citizen of Mexico who entered the United States in 1974 as a non-immigrant and adjusted his status to that of a lawful permanent resident on December 7, 1990. On August 19, 1994, after entering a guilty plea, petitioner was convicted of the felony offense of conspiracy to participate in a racketeering enterprise, in violation of 18 U.S.C. 1962(d). The conspiracy involved "the conduct of the affairs of an enterprise which promoted and facilitated the importation, acquisition, possession and distribution of cocaine." App., *infra*, 6a. Petitioner was sentenced to 48 months' imprisonment for that offense. *Id.* at 2a.

On September 26, 1995, the Immigration and Naturalization Service (INS) issued an Order to Show Cause, charging petitioner with deportability under 8 U.S.C. 1251(a)(2)(A)(iii) (1994) (conviction of an aggravated felony) and 8 U.S.C. 1251(a)(2)(B)(i) (1994) (conviction of a controlled substance offense).[2] On February 14, 1996, petitioner filed an application for bond, indicating his intent to apply for relief under Section 1182(c). See Mot. for Bond Redetermination at 1. Petitioner's next substantive deportation hearing was not held until January 9, 1997, after AEDPA had been enacted into law. At that hearing, petitioner again indicated an intent to apply for relief under Section 1182(c), but the immigration judge (IJ) expressed uncertainty whether he was still eligible. See 1/9/97 Tr. 24. On April 16, 1997, the IJ found that petitioner was deportable as an

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[2] Under the Attorney General's regulations, a deportation proceeding was formally "commenced" when the Order to Show Cause was filed with the immigration court. See 8 C.F.R. 3.14(a) (1996). The record in this case does not indicate the date on which the Order to Show Cause was filed, but it was plainly before February 14, 1996, when an immigration judge held a bond hearing in this case, and so was also before the enactment of AEDPA.

alien convicted of an aggravated felony and a controlled substance offense. App., *infra*, 4a-6a. On March 25, 1998, petitioner filed a formal application for Section 1182(c) relief. The IJ subsequently concluded that petitioner was not eligible for Section 1182(c) relief. See *id.* at 10a. The BIA agreed with the IJ that petitioner was deportable and ineligible for Section 1182(c) relief, and dismissed petitioner's appeal. *Id.* at 18a-19a, 21a.

3. Petitioner then filed a petition for a writ of habeas corpus in district court, invoking the court's jurisdiction under the general federal habeas corpus statute, 28 U.S.C. 2241. The district court denied the petition, finding none of petitioner's claims meritorious. Pet. App. 7-8.

4. The court of appeals affirmed. Pet. App. 1-6. The court first concluded (*id.* at 2), as it had in a prior decision, *Requena-Rodriguez* v. *Pasquarell*, 190 F.3d 299 (5th Cir. 1999), that the district court had jurisdiction under 28 U.S.C. 2241 to entertain challenges to the merits of a final order of deportation, where the habeas petitioner contended that the INA itself (Section 1182(c), as amended by AEDPA Section 440(d)) was unconstitutional and that the application of Section 440(d) to his case was outside the proper temporal scope of that statute.[3]

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[3] The government argued below, as it argued in *Requena-Rodriguez*, that AEDPA and IIRIRA had divested the district courts of any authority under 28 U.S.C. 2241 to review the merits of final orders of deportation. The court of appeals concluded in *Requena-Rodriguez* that, in cases where judicial review is governed by the "transition rules" of IIRIRA—*i.e.*, cases in which deportation proceedings were commenced before IIRIRA's general effective date, April 1, 1997—Congress had not divested the district courts of that authority. 190 F.3d at 304-306. The court expressly limited its ruling, however, to cases governed by the

The court of appeals then concluded (Pet. App. 2-4), also based on its decision in *Requena-Rodriguez*, that AEDPA Section 440(d) may be applied to bar relief for an alien who was convicted of a disqualifying crime before AEDPA was enacted. The court stated that "pre-AEDPA convictions can trigger AEDPA Section 440(d), at least when an application for [§ 1182(c)] relief was not pending on the date that AEDPA took effect." Pet. App. 2-3 (internal quotation marks and citation omitted). Because (according to the court) petitioner filed his application for relief under Section 1182(c) after the effective date of AEDPA, the court ruled that

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transition rules, and made clear that it did "not determine whether any habeas jurisdiction remains under IIRIRA's permanent provisions." *Id.* at 309. Since that time, the Fifth Circuit has held that the permanent provisions of IIRIRA did divest the district courts of habeas corpus jurisdiction to review the merits of final orders of removal. See *Max-George* v. *Reno*, 205 F.3d 194, 198-203 (2000); but see *Flores-Miramontes* v. *INS*, 212 F.3d 1133, 1135-1143 (9th Cir. 2000) (holding that district courts retain such authority under permanent rules); *Liang* v. *INS*, 206 F.3d 308, 313-323 (3d Cir. 2000) (same).

There is a conflict in the circuits as to whether the district courts retain habeas corpus jurisdiction under IIRIRA's transition rules to review the merits of deportation orders. Compare, *e.g.*, *Requena-Rodriguez*, *supra*, with *LaGuerre* v. *Reno*, 164 F.3d 1035, 1039 (7th Cir. 1998), cert. denied, 120 S. Ct. 1157 (2000). Nonetheless, this Court has denied a number of certiorari petitions raising the question whether such habeas corpus jurisdiction remains under IIRIRA's transition rules. See *LaGuerre* v. *Reno*, 120 S. Ct. 1157 (2000); *Reno* v. *Goncalves*, 526 U.S. 1004 (1999); *Reno* v. *Navas*, 526 U.S. 1004 (1999).

AEDPA Section 440(d) prohibits him from obtaining discretionary relief under Section 1182(c).[4]

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[4] Although the court of appeals stated that petitioner did not apply for Section 1182(c) relief until after AEDPA was enacted, it is not entirely clear that that statement is correct. As noted above, although petitioner did not make a formal application for Section 1182(c) relief until after AEDPA was enacted, he noted in a motion for bond redetermination filed before its enactment that he intended to seek relief under Section 1182(c). Petitioner has not, however, argued in his certiorari petition that the court of appeals erred on that point, nor did he raise that point in a petition for rehearing.

In addition, petitioner appears not to have argued in the lower courts that AEDPA Section 440(d) was inapplicable to his case on the ground that his deportation proceedings were commenced before AEDPA was enacted. Several other aliens in the Fifth Circuit have raised that contention, but that issue has not yet been decided by that court. A number of other courts of appeals, however, have concluded that AEDPA Section 440(d) does not apply to any alien who was placed in deportation proceedings before AEDPA was enacted, and in so doing have rejected the Attorney General's construction of AEDPA Section 440(d) in *Soriano*. See *Goncalves* v. *Reno*, 144 F.3d 110, 126-133 (1st Cir. 1998), cert. denied, 526 U.S. 1004 (1999); *Henderson* v. *INS*, 157 F.3d 106, 129-130 (2d Cir. 1998), cert. denied *sub nom. Reno* v. *Navas*, 526 U.S. 1004 (1999); *Sandoval* v. *Reno*, 166 F.3d 225, 241 (3d Cir. 1998); *Tasios* v. *Reno*, 204 F.3d 544, 550-552 (4th Cir. 2000); *Pak* v. *Reno*, 196 F.3d 666, 675-676 (6th Cir. 1999); *Shah* v. *Reno*, 184 F.3d 719, 724 (8th Cir. 1999); *Magana-Pizano* v. *INS*, 200 F.3d 603, 611 (9th Cir. 1999); *Mayers* v. *INS*, 175 F.3d 1289, 1301-1304 (11th Cir. 1999). The Seventh Circuit, by contrast, has upheld the Attorney General's decision in *Soriano* and concluded that AEDPA Section 440(d) applies to all aliens placed in deportation proceedings before or after AEDPA was enacted. *LaGuerre*, 164 F.3d at 1040-1041. This Court has denied four certiorari petitions presenting issues about the temporal scope of AEDPA Section 440(d). See *Palaganas-Suarez* v. *Greene*, 120 S. Ct. 1539 (2000); *LaGuerre* v. *Reno*, *supra*; *Reno* v. *Goncalves*, *supra*; *Reno* v. *Navas*, *supra*.

The court also rejected petitioner's claim that Section 440(d) of AEDPA violates his right to equal protection because it precludes aliens in deportation proceedings, but not exclusion proceedings, from obtaining Section 1182(c) relief. Pet. App. 3. Again based on its deci sion in *Requena-Rodriguez*, the court concluded that AEDPA Section 440(d) is rational because it creates an incentive for deportable criminal aliens to leave the United States, by affording them the opportunity to seek a waiver should they seek to return to this country and by doing so trigger exclusion proceedings. *Id.* at 3-4.

The court next rejected petitioner's contention that AEDPA Section 440(d) violated his due process rights because he might have received relief, prior to AEDPA's amendment of Section 1182(c), if either the INS had commenced proceedings sooner or his case had proceeded more expeditiously. Pet. App. 4. The court

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In response to the division among the circuits about the temporal scope of AEDPA Section 440(d), the Department of Justice has recently published a proposed rule for notice and comment. 65 Fed. Reg. 44,476 (2000). The proposed rule would permit aliens who were placed in deportation proceedings before the effective date of AEDPA and who received final orders of deportation denying Section 1182(c) relief based on *Soriano* to move to reopen their deportation proceedings in order to reapply for relief under Section 1182(c). See *id.* at 44,478. The proposed rule would apply, moreover, regardless of the date on which the alien applied to an IJ for Section 1182(c) relief. Thus, if a final rule is issued in substantially the same form as the proposed rule, it would appear that petitioner would be eligible to move to reopen his proceedings to reapply for relief under Section 1182(c). We have been informed by the INS that, in light of the publication of the proposed rule, it has placed an administrative "hold" on the deportation of aliens who *prima facie* would appear to be eligible to move to reopen their proceedings under the proposed rule.

observed that "an alien in deportation proceedings has no constitutional right to a speedy proceeding." *Ibid.* Furthermore, the court reasoned, relief pursuant to Section 1182(c) was a matter of "grace" and "conferred no status." *Ibid.*

Finally, the court rejected petitioner's claim that the BIA erred in concluding that he had been convicted of an aggravated felony, as defined by the INA. Pet. App. 5. Petitioner maintained that his racketeering-conspiracy offense was not an "aggravated felony" as defined in the INA at the time his deportation proceedings were commenced. The court observed, however, that Congress had extended the statutory definition of "aggravated felony" to include petitioner's offense while petitioner's deportation proceedings were pending, and that Congress also had made clear that this expanded definition was to be applied to proceedings based on convictions "before, on, or after the date of [AEDPA's] enactment." *Ibid.*[5] Relying on

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[5] The court of appeals stated (Pet. App. 5) that AEDPA expanded the definition of "aggravated felony" as pertinent here and also directed that the expanded definition be applied regardless of the date of conviction. In fact, those changes were enacted into law by IIRIRA, not AEDPA. Before IIRIRA, the definition of "aggravated felony" had included a racketeering offense "for which a sentence of 5 years' imprisonment or more may be imposed." 8 U.S.C. 1101(a)(43)(J) (1994). IIRIRA amended that provision to cover a racketeering offense "for which a sentence of one year imprisonment may be imposed." IIRIRA § 321(a)(4), 110 Stat. 3009-627; 8 U.S.C. 1101(a)(43)(J) (Supp. IV 1998). In addition, IIRIRA § 321(b) provided that the term "aggravated felony" applies "regardless of whether the conviction was entered before, on, or after" the date of enactment of IIRIRA (September 30, 1996). 110 Stat. 3009-628; 8 U.S.C. 1101(a)(43) (flush paragraph) (Supp. IV 1998). The amendments in Section 321 of IIRIRA were also expressly made applicable to "actions taken on or after the

those statutory amendments, including the explicit effective date, the court concluded that the BIA had correctly applied the new definition of "aggravated felony" to petitioner's case. *Id.* at 6.

ARGUMENT

Petitioner contends that the court of appeals erred in concluding that Section 440(d) of AEDPA is properly applied to bar relief from deportation under 8 U.S.C. 1182(c)(1994) to an alien who is subject to deportation based on a criminal conviction entered before AEDPA was enacted. He also argues that, so applied, Section 1182(c) as amended by AEDPA violates equal protection because it bars relief only for aliens placed in deportation proceedings and not also aliens placed in exclusion proceedings. Petitioner's challenges are closely related to the issues that were presented in the government's certiorari petitions denied by this Court over a year ago in *Reno* v. *Goncalves*, 526 U.S. 1004 (1999), and *Reno* v. *Navas*, 526 U.S. 1004 (1999), as well as the certiorari petitions filed by aliens and denied by this Court more recently in *Palaganas-Suarez* v. *Greene*, 120 S. Ct. 1539 (2000), and *LaGuerre* v. *Reno*, 120 S. Ct. 1157 (2000).[6] There is no basis in this case for a different result. Like those cases, this case concerns

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date of the enactment of" IIRIRA. IIRIRA § 321(c), 110 Stat. 3009-628. As the BIA concluded in this case (App., *infra*, 18a), the IJ's and the BIA's considerations of this case were "actions taken" after September 30, 1996, and therefore petitioner was subject to the expanded definition of "aggravated felony."

[6] Related contentions about the temporal scope and constitutionality of AEDPA Section 440(d) are also raised in pending certiorari petitions in *Lechuga* v. *Perryman*, No. 99-2082 (filed June 27, 2000), *Smith* v. *Reno*, No. 99-9096 (filed Apr. 12, 2000), *De Horta-Garcia* v. *United States*, No. 99-9140 (filed Apr. 11, 2000), and *Almon* v. *Reno*, No. 99-9214 (filed Apr. 20, 2000).

substantive issues of eligibility for relief from deportation that arise under 8 U.S.C. 1182(c) (1994), as amended by AEDPA Section 440(d). Section 1182(c) was prospectively repealed by Congress in IIRIRA, and so the issues presented in this case have minimal ongoing significance. In addition, petitioner may be eligible to reapply for administrative relief from deportation under a proposed rule that has been published for notice and comment by the Attorney General. Further review is therefore not warranted.

1. Petitioner first argues (Pet. 6-24) that the court of appeals erred in concluding that Section 440(d) of AEDPA applies to his case, notwithstanding that his criminal convictions preceded the enactment of AEDPA. He notes, in support of that argument, that the courts of appeals have reached differing conclusions about the temporal scope of AEDPA Section 440(d).

The courts of appeals have reached divergent views about the temporal scope of AEDPA Section 440(d). Most circuits have concluded that AEDPA Section 440(d) does not bar relief for an alien against whom deportation proceedings were commenced before the date on which AEDPA was enacted.[7] The First and Ninth Circuits have also held that AEDPA Section 440(d) would not apply to an alien who was convicted before AEDPA was enacted, but only if the alien could show that he pleaded guilty in specific reliance on the fact that, under the state of the law before AEDPA was enacted, he might have been eligible for relief under

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[7] See *Goncalves*, 144 F.3d at 126-133; *Henderson*, 157 F.3d at 128-130; *Sandoval*, 166 F.3d at 241; *Pak*, 196 F.3d at 675-676; *Shah*, 184 F.3d at 724; *Magana-Pizano*, 200 F.3d at 611; *Mayers*, 175 F.3d at 1301-1304.

Section 1182(c).[8] The Fourth Circuit has gone further and held that AEDPA Section 440(d) does not apply in the case of any alien (such as petitioner) who pleaded guilty to one of the offenses covered in that Section and was convicted before AEDPA was enacted.[9] The Third, Fifth, and Tenth Circuits have held that AEDPA Section 440(d) does apply to aliens who were convicted before AEDPA was enacted but placed in deportation proceedings after its enactment.[10] And the Seventh Circuit has held that AEDPA Section 440(d) applies even to aliens who were already in deportation proceedings on the date of AEDPA's enactment.[11]

Despite that disagreement among the courts of appeals, petitioner's challenge to the application of AEDPA Section 440(d) in his case does not warrant this Court's review. That contention relates only to the availability of relief under a provision that Congress has prospectively repealed. Further, the issue has now been settled in most circuits, and the issue is inherently restricted to transitional cases that were commenced administratively more than three years ago, before the April 1, 1997, effective date of IIRIRA's permanent provisions. This Court has denied review of four other petitions raising issues concerning the temporal scope

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[8] See *Mattis* v. *Reno*, 212 F.3d 31, 36-41 (1st Cir. 2000); *Magana-Pizano*, 200 F.3d at 612-613. Petitioner has not contended that he pleaded guilty in specific reliance on the state of the law at the time of his guilty plea.

[9] *Tasios*, 204 F.3d at 550-552.

[10] See *DeSousa* v. *Reno*, 190 F.3d 175, 185-187 (3d Cir. 1999); *Requena-Rodriguez*, 190 F.3d at 306-308; *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1152-1155 (10th Cir. 1999), cert. denied *sub nom. Palaganas-Suarez* v. *Greene*, 120 S. Ct. 1539 (2000).

[11] See *Turkhan* v. *Perryman*, 188 F.3d 814, 827-829 (1999); *LaGuerre*, 164 F.3d at 1040-1041.

of AEDPA Section 440(d), and there is no reason for a different result here. See pp. 11-12, *supra*.

In addition, the Department of Justice has recently published for notice and comment a proposed rule responding to the circuits that have rejected the Attorney General's construction of the temporal scope of AEDPA Section 440(d). See 65 Fed. Reg. 44,476 (2000). That proposed rule would essentially acquiesce in the determination, by the majority of the circuits, that Congress intended AEDPA Section 440(d) not to apply in the cases of aliens who were placed in deportation proceedings before AEDPA was enacted. *Id.* at 44,478. It would, however, maintain the Attorney General's current position that AEDPA Section 440(d) is properly applied to bar relief for aliens who were placed in proceedings after AEDPA was enacted, even if the conviction forming the basis of the deportability charge was entered before that date of enactment. *Ibid.* The rule would therefore allow an alien who was placed in deportation proceedings before AEDPA was enacted and was denied Section 1182(c) relief based on *Soriano* to move to reopen his proceedings in order to reapply for relief under Section 1182(c), notwithstanding AEDPA Section 440(d). *Ibid.*

The proposed rule provides a further reason for denial of this petition, because petitioner may well be eligible to reapply for administrative relief under the rule. Petitioner's deportation proceedings were commenced before AEDPA was enacted. Petitioner did not argue below that AEDPA Section 440(d) was inapplicable to his case for that reason, but if the rule is issued as a final rule in substantially its present form, it should permit petitioner to seek to reopen his deportation proceedings. Meanwhile, we have been informed by the INS that it has placed an administrative hold on the

deportation of aliens who were placed in deportation proceedings before AEDPA was enacted and who would appear *prima facie* to be eligible to reapply for relief under the proposed rule.

2. Petitioner's first equal-protection claim, that Section 440(d) is irrational because it applies only to aliens placed in deportation proceedings in the United States and not also to aliens placed in exclusion proceedings when they seek to return from abroad, also does not warrant further review. First, as is true of the issue of the temporal scope of AEDPA Section 440(d) discussed above, the equal-protection issue is of minimal prospective importance because Congress has repealed Section 1182(c), and the claim by its nature concerns only transitional cases. Second, there is no conflict among the circuits on the issue. Every other circuit that has addressed the equal-protection challenge to Section 440(d) has also rejected it.[12]

Third, the court of appeals' rejection of petitioner's equal-protection claim is correct. Congress had a rational basis for precluding certain criminal aliens placed in deportation proceedings in the United States from obtaining Section 1182(c) relief, even while allow-

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[12] See *Almon* v. *Reno*, 192 F.3d 28, 31-32 (1st Cir. 1999), petition for cert. pending, No. 99-9214; *DeSousa*, 190 F.3d at 184-185; *Jurado-Gutierrez*, 190 F.3d at 1152-1153; *LaGuerre*, 164 F.3d at 1041. The Ninth Circuit has concluded that AEDPA Section 440(d) is not limited to deportable aliens and does in fact bar relief under Section 1182(c) for excludable aliens as well. See *United States* v. *Estrada-Torres*, 179 F.3d 776, 779 (1999), petition for cert. pending, No. 99-10166. That decision, however, would afford petitioner no benefit, because in the Ninth Circuit, as well as in the circuits that have addressed the distinction, a deportable alien covered by AEDPA Section 440(d) could obtain no relief under Section 1182(c).

ing criminal aliens seeking to return to the United States from a trip abroad to remain eligible for such relief. Cf. *Fiallo* v. *Bell*, 430 U.S. 787, 794 (1977) (in light of Congress's plenary power over immigration, statutory classification must be upheld if it is based upon any "facially legitimate and bona fide reason"). The court of appeals observed that Congress's distinction encourages deportable aliens to leave the country —"which is after all the goal of deportation"—by providing them with an opportunity to apply for Section 1182(c) relief in exclusion proceedings if they attempt to return. Pet. App. 3.

Petitioner's reliance (Pet. 25-26) on *Francis* v. *INS*, 532 F.2d 268 (2d Cir. 1976), is misplaced. *Francis* addressed a distinction that the BIA had drawn (for purposes of eligibility for Section 1182(c) relief) between two classes of aliens placed in deportation proceedings in the United States, based solely on whether the alien had previously taken a temporary trip abroad. See *Requena-Rodriguez*, 190 F.3d at 308-309 (explaining *Francis*); p. 2 n. 1, *supra*. Petitioner's claim challenges an entirely different distinction, between aliens placed in deportation proceedings in the United States and aliens placed in exclusion proceedings at the border or a port of entry. That distinction has been fundamental to many aspects of the INA. See *Landon* v. *Plasencia*, 459 U.S. 21, 25-28 (1982). Given the quite different purposes of the two kinds of proceedings and the different ways in which they operate, Congress is entitled to make different judgments about the kinds of claims for discretionary relief that may be considered in deportation and exclusion proceedings.

3. Petitioner's final claim (Pet. 27-30) is that the divergent appellate decisions about the temporal scope of AEDPA Section 440(d) violate equal protection be-

cause aliens are eligible (or ineligible) for discretionary relief under Section 1182(c) depending upon where they reside. That argument simply recasts petitioner's claim of a conflict among the circuits about the temporal scope of Section 440(d) of AEDPA. While a split in circuit authority is a potential reason for granting a petition for a writ of certiorari, the difference of opinions among the circuits on the temporal scope of AEDPA Section 440(d) does not merit this Court's review, for the reasons we have given above. Moreover, no court of appeals has concluded that the existence of divergent opinions among the courts of appeals gives rise to a constitutionally-based equal protection claim for an alien against the INS or the Attorney General. Cf. *Berroteran-Melendez* v. *INS*, 955 F.2d 1251, 1258 (9th Cir. 1992) (mere fact that one alien received a different decision than another alien does not raise an equal protection claim).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2000

APPENDIX A

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
HOUSTON, TEXAS

File No: A90-474-082

IN THE MATTER OF DIEGO ALFARACHE
RESPONDENT

IN DEPORATION PROCEEDINGS

[Apr. 16, 1997]

ON BEHALF OF RESPONDENT

Max L. Christenson, Esq.
314 N. Texas
Odessa, TX 79761

ON BEHALF OF SERVICE

Benjamin D. Somera
Assistant District Counsel
Houston, TX

DECISION OF THE IMMIGRATION JUDGE

Respondent is a 29-year-old native and citizen of Mexico. Respondent entered the United States on or about 1974 as a nonimmigrant and adjusted his status to that of a lawful permanent resident on December 7, 1990.

On August 19, 1994 Respondent was convicted in the United States District Court for the Southern District of Texas for the felony offense of "[c]onspiracy to parti-

cipate in a racketeering enterprise" in violation of 18 U.S.C. § 1962(d), for which he received a sentence of 48 months imprisonment with supervised release for a term of 3 years. (*See* Service's Trial Ex. C.)

By Order to Show Cause (OSC) issued on September 26, 1995, the Immigration and Naturalization Service (Service) charged Respondent with deportability pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (Act), as an alien who entered the United States without inspection, section 241(a)(2)(B)(i) of the Act, as an alien convicted of a controlled substance offense, and section 241(a)(2)(A)(iii), as an alien convicted of an aggravated felony.

In a deportation hearing held on April 10, 1996 Respondent admitted the truth of certain factual allegations in the OSC. The Service alleged and Respondent, while represented by counsel, admitted that Respondent is neither a citizen or a national of the United States, but is instead a native and citizen of Mexico whose status was adjusted to that of a lawful permanent resident on or about December 7, 1990. (*See* Ex. 1, allegations #1, 2, 5.) In addition, the Service alleged and Respondent admitted that on August 9, 1994, Respondent was convicted in the United States District Court Southern District of Texas for the offense of conspiracy to participate in a racketeering enterprise. (*See* Ex. 1, allegation 6.) The Respondent's admissions establish these allegations by clear, convincing, and unequivocal evidence.

The third and fourth allegations submitted by the Service, which are that on or about 1968 at or near Houston, Texas, Respondent entered the United States and was not then inspected by an immigration officer,

and all charges of deportability were denied by Respondent. At the conclusion of the hearing held on April 10, 1996 the court continued the proceedings to allow the Service to submit a brief in support of its charges of deportability. On May 7, 1996, the Service submitted the "Service's Memorandum-Brief" in support of their argument that Respondent's conviction renders him deportable as an alien convicted at any time after entry of an aggravated felony and of a violation of any law relating to a controlled substance. On May 29, 1996, Respondent filed his "Brief Showing Cause for Termination of Deportation Proceedings." Respondent, in his brief, contends that his conviction occurred after the definition of aggravated felony at section 101(a)(43) of the Act was amended to include 18 U.S.C. § 1962 offenses and that the amended definition should not apply "retroactively" to his conviction. In addition, Respondent contends that his conviction is not a conviction for a violation of a law "relating to a controlled substance."

On June 14, 1996 the Service lodged an additional charge against Respondent, charging that he is subject to deportation pursuant to section 241(a)(1)(B) of the Act in that Respondent is an alien who is in the United States in violation of the Act or any other law of the United States. At the conclusion of the hearing, the court continued the proceedings to allow Respondent to examine the new charge of deportability.

In a deportation hearing held on January 9, 1997, the court found that the third and fourth allegations, which are that Respondent entered the United States on or about 1968 at or near Houston, Texas, without inspection, and the charge of deportability related to entry

without inspection were not sustained. The third allegation was amended to state that Respondent entered the United States on or about 1974 at or near Houston, Texas as a nonimmigrant with an "A-2" visa, which the Respondent admitted.

At the conclusion of the hearing held on January 9, 1997, the court continued the proceedings to examine the record and to issue a written decision on the issue of deportability in Respondent's case. For the reasons that follow, the court finds that Respondent is deportable as the Service has charged under section 241(a)(2)(A)(iii) of the Act, as an alien who has been convicted of an aggravated felony, and under section 241(a)(2)(B)(i) of the Act, as an alien convicted of a controlled substance offense.

DISCUSSION

On September 30, 1996, while this matter was pending, the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) enacted as Division C of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 1996 U.S.C.C.A.N. (110 Stat.) 3009. Section 321 of the IIRIRA broadens the definition of "aggravated felony" under section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43). Under section 101(a)(43)(J) of the Act, as amended by section 321(a)(4) of the IIRIRA, an aggravated felony is defined to include "an offense described in section 1962 of title 18, United States Code (relating to racketeer influenced corrupt organizations) . . . for which a sentence of one year imprisonment or more may be imposed." *See* INA § 101(a)(43)(J), 8 U.S.C. § 1101(a)(43)(J).

Section 321(b) of the IIRIRA eliminates all temporal limitations previously assigned to the "aggravated felony" definition. *See In re Noble*, Int. Dec. 3301 at 19 n.12 (BIA 1997). The IIRIRA added the following new sentence to the statutory definition of "aggravated felony": "Nothwithstanding any other provision of law (including any effective date), the term ["aggravated felony"] applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph." 8 U.S.C. § 1101(a)(43). Therefore, the amended definition of "aggravated felony" applies to convictions entered before, on, or after the date of enactment. *See* IIRIRA § 321(b); *In re Yeung*, Int. Dec. 3297 at 3 (BIA 1996). With one exception not applicable to this matter, the amendments made by section 321 of the IIRIRA "apply to actions taken on or after the date of the enactment" of IIRIRA, "regardless of when the conviction occurred." IIRIRA § 321(c).

The next issue is whether Respondent's conviction under section 1962(d) of title 18 for conspiracy to participate in a racketeering enterprise is a conviction for a violation of "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." INA § 241(a)(2)(B)(i), 8 U.S.C. § 1251(a)(2)(B)(i). Respondent has admitted that he was convicted of conspiracy to participate in a racketeering enterprise in violation of 18 U.S.C. § 1962(d). "Racketeering activity" is defined in "Chapter 96—Racketeer Influenced and Corrupt Organizations" of title 18 to include "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical

(as defined in section 102 of the Controlled Substances Act)." 18 U.S.C. § 1961(1).

The fact that the racketeering statute under which Respondent was convicted proscribes other forms of interstate criminal activity does not mean that "it is not also, in appropriate cases, a law relating to controlled substances." *Johnson v. INS*, 971 F.2d 340, 342 (9th Cir. 1992) (holding that violation of a federal racketeering statute prohibiting interstate travel in aid of business enterprises involving, inter alia, controlled substances was, under the circumstances before the court, a crime relating to controlled substances).

Respondent pleaded guilty to the charge that he conspired to conduct and participate, directly and indirectly and through a pattern of racketeering activity, the conduct of the affairs of an enterprise which promoted and facilitated the importation, acquisition, possession and distribution of cocaine. (*See* Service's Trial Ex. D.) Therefore, Respondent's conviction is for a crime relating to controlled substances and is properly a basis for deportation under section 241(a)(2)(B)(i).

Based on the foregoing, the court concludes that Respondent's deportability pursuant to sections 241(a)(2)(A)(iii) and 241(a)(2)(B)(i) of the Act has been established by clear, unequivocal, and convincing evidence. *See Woodby v. INS*, 385 U.S. 276 (1966); 8 C.F.R. § 242.14(a).

The Service's lodged charge of deportability based on the Respondent's presence in the United States in violation of the Act or any other law of the United States is not sustained. The Service, in the Form I-261, neither amended the factual allegations set forth in the

OSC nor added additional factual allegations to the OSC. (*See* Ex. 6.) The allegations contained in the OSC do not support the lodged charge of deportability.

At the hearing scheduled for December 23, 1997, Respondent must be prepared to proceed regarding identifying form(s) of relief from deportation and his eligibility for such forms of relief.

4/16/97 /s/ CLAREASE MITCHELL RANKIN
CLAREASE MITCHELL RANKIN
U.S. Immigration Judge

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
HOUSTON, TEXAS

File No: A90-474-082

IN THE MATTER OF DIEGO ALFARACHE
RESPONDENT

IN DEPORATION PROCEEDINGS

[June 30, 1998]

CHARGES:

Section 241(a)(1)(B) of the Immigration and Nationality Act, for having entered the United States without inspection; § 241(a)(2)(A)(iii) of the Immigration and Nationality Act, for having been convicted of an aggravated felony; § 241(a)(2)(B)(i) of the Immigration and Nationality Act, for having been convicted of a violation of a conspiracy attempt to violate any law or regulation of a state, the United States or a foreign country relating to a controlled substance.

APPLICATIONS:

Section 212(c) and political asylum and withholding of deportation in the alternative.

ON BEHALF OF RESPONDENT

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ON BEHALF OF SERVICE

Benjamin Somera, Esq.
Assistant District Counsel
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ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent in this case is a native and citizen of Mexico. He entered the United States in or about 1974 as a non-immigrant and he adjusted his status to that of a lawful permanent resident on December 7th, 1990. On August 19th, 1994, the Respondent was convicted in the United States District Court for the Southern District of Texas for the felony offense of conspiracy to participate in a racketeering enterprise, in violation of 18 U.S.C. Section 1962(d), for which he received a sentence of 48 months of imprisonment, with a supervised released [*sic*] for a term of three years.

Subsequently, the Immigration and Naturalization Service issued an Order to Show Cause on September the 26th, 1995, charging the Respondent with being deportable pursuant to Section 241(a)(1)(B) of the Immigration and Nationality Act as an immigrant who entered the United States without inspection, Section 242(b)(1) of the Act as set forth above, and Section 241(a)(2)(A)(ii) as set forth above. The Respondent was placed in deportation proceedings. At the master calendar hearing, the Respondent admitted the truth of the factual allegations 1, 2, and 3, denied allegation 4, admitted allegation 5, admitted allegation number 6, denied the 241(a)(1)(B) charge, and denied

241(a)(2)(A)(iii), and denied 241(a)(2)(B)(i). The Respondent was given an opportunity to provide pleadings to support his denial of the charges. The Service submitted conviction records and documentation in support of the charges. There were several pleadings filed, and finally the Court issued an order in response to the Respondent's request to be allowed to apply for 212(c) relief and asylum, indicating that the Court found that the 241(a)(1)(B) charge would not be sustained. There was no proof that the Respondent had entered without inspection. But the 241(a)(2)(A)(iii) charge was in fact found to be true by the Court. The Respondent had been convicted as an aggravated felon. And in addition, the 241(a)(2)(B)(i) charge was sustained. The Court found that the Respondent had been convicted of a law in violation of the Controlled Substances Act. The Court denied the Respondent's request to apply for 212(c) relief, and upheld the Service's argument that the Respondent was not eligible for 212(c) relief. See Exhibit number 7 for a detailed rationale of the decision of the Immigration Judge.

The Court ordered the Respondent to appear and be prepared to proceed to identify any forms of relief that it might be eligible to apply for. The Respondent argued that it was eligible to apply for withholding of deportation, as the charges, since they were conspiracy, were not a particularly serious crime, and in addition the Respondent argued if the charges were found to be particularly serious, based on the Torture Convention, the Respondent should be allowed to avoid deportation to the country of Mexico. The Court scheduled a hearing on the Respondent's argument for June 30th, 1998 at 1:30. On that date, the Respondent appeared prepared to go forward on the arguments in support of his

not being convicted of a particularly serious crime. The Respondent appeared with David Lemoyne, who is a Federal Bureau of Investigation Special Agent, Theodore Cummins, an agent from the Drug Enforcement Agency, Ed Gleason, Probation Officer, Robert Simpson, a former coworker of the Respondent, Bulimio Alfarache and Consuelo Alfarache, the parents of the Respondent, to testify regarding the full rehabilitation of the Respondent, and Melinda Sherman, also to testify regarding the full rehabilitation of the Respondent. The Court allowed each Respondent to identify themselves, and ruled that the only witnesses whose testimony would be relevant would be the agents from the FBI and the Drug Enforcement Agency.

The witness Special Agent David Lemoyne testified that the Respondent had been instrumental in assisting in their investigation of a special drug cartel. The Respondent had been arrested for being involved in the Colombian cocaine traffic from 1986 relating to their RICO investigation. Mr. Alfarache was a drug customer. That means he purchased drugs and sold drugs in the Austin area from the cartel. He served as a Government witness, and his fear is that he will be tortured for testifying against a Samuel Posada-Rios, who was the head of the drug cartel. Agent Lemoyne testified that Mr. Posada-Rios is the head of one of the *most dangerous organizations in Houston.* Agent Lemoyne testified that the cartel has been involved in at least twenty homicides and other atrocious acts. The Court did raise a question with the witness as to why the Respondent did not go into the witness protection program. The witness did not have an answer to that. In fact, the witness indicated that had he been the Respondent, he would have sought witness protection.

The witness also testified that there was possibly one Mexican federal official who may be involved in the drug cartel, but he was not sure that that was the case. That answer was given in response to the attorney for the Respondent raising that issue. The witness Agent Lemoyne testified that the Respondent's role in the offense was the most minor, but that this was also a most serious offense, and the Agent answered yes several times when he was asked whether or not this was a serious offense.

On cross examination, the witness indicated that the Respondent's helping the Government did not make this crime any less serious.

The next witness to testify on behalf of the Respondent was Special Drug Enforcement Agent Theodore Cummins. He testified that the Respondent was a purchaser and distributor of the drugs from the cartel, and that he did cooperate with the police in its investigation. He testified that the Respondent may be better off in the United States because he would have the protection of the United States Government, and in answer to the big question as to whether or not this was a particularly serious crime, and whether or not his cooperation with the Government made it any less serious, the witness testified that the Respondent's involvement was a particularly serious crime, and that no, his cooperation with the Government did not make it any less serious.

After listening to the testimony, the Court is satisfied that the Respondent does not qualify for withholding of deportation, as this is a particularly serious crime in which he has been involved, and the Court is satisfied that his cooperation does not make it any less serious.

As to the argument for withholding of deportation based upon the Torture Convention, the Court does not believe that it would be in violation of the role the United States is to play in the Torture Convention if the Respondent is to be deported to his native country of Mexico. In fact the Court, based upon the testimony of the first witness, believes it is possible that the Respondent may be better off in Mexico than in the United States, since Special Agent Lemoyne testified that Samuel Posada-Rios is the head of the drug cartel which is "the most dangerous organization in Houston."

Based upon the evidence presented and the pleadings submitted, the Court finds that the Respondent has been convicted of a particularly serious crime and thus is not eligible for withholding of deportation, nor is the Torture Convention applicable in this particular case.

Thus, it is ordered that the Respondent's application for withholding of deportation be denied, and that the Respondent be deported to his native country of Mexico.

/s/ CLAREASE MITCHELL RANKIN
CLAREASE MITCHELL RANKIN
U.S. Immigration Judge

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

DECISION OF THE
BOARD OF IMMIGRATION APPEALS

File: A90 474 082-HOUSTON Date: JAN 4, 1999

In re: DIEGO ALFARACHE

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

ROBERT E. KAHN, ESQUIRE
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BELLAIRE, TEXAS 77401

ON BEHALF OF SERVICE:

BENJAMIN D. SOMERA
ASSISTANT DISTRICT COUNSEL

The respondent appeals from an Immigration Judge's decision ordering him deported from the United States to Mexico. The appeal will be dismissed.

The respondent, a native and citizen of Mexico, entered the United States sometime in 1974. His status was adjusted to that of a lawful permanent resident on December 7, 1990. On August 9, 1994, he was convicted of conspiracy to participate in a racketeering enterprise in violation of 18 U.S.C. § 1962(d). The Immigration and Naturalization Service filed an Order to Show Cause on October 18, 1995, charging that the respon-

dent was deportable pursuant to sections 241(a)(1)(B), (2)(A)(iii), and (B)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1251(a)(1)(B), (2)(A)(iii), and (B)(i), as an alien who entered without inspection, and was convicted of an aggravated felony and drug violation. The Service subsequently lodged an additional ground of deportation, and charged the respondent with deportability pursuant to section 241(a)(1)(B) of the Act, as an alien in the United States in violation of the law. The respondent contested all the grounds of deportability. The Immigration Judge found the respondent deportable only pursuant to sections 241(a)(2)(A)(iii) and (B)(i) of the Act, pretermitted the respondent's applications for relief, and ordered the respondent deported from the United States to Mexico.

I. APPELLATE ARGUMENTS

On appeal, the respondent first contends that he is not deportable as an alien convicted of an aggravated felony. He asserts that the Order to Show Cause is defective because the Service failed to allege which subdivision of the definition of an aggravated felony under section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43), applies to the respondent. In the alternative, the respondent contends that his conviction is not an aggravated felony as defined in section 101(a)(43)(J) of the Act.

With respect to relief from deportation, the respondent contends that the Immigration Judge erred in pretermitting his request for a waiver of inadmissibility pursuant to section 212(c) of the Act, 8 U.S.C. § 1182(c). He further challenges the Immigration Judge's determination that he has been convicted of a particularly serious crime, and thus, is ineligible for withholding of deportation.

In response, the Service supports the Immigration Judge's findings that the respondent is not eligible for relief from deportation. The Service urges this Board to adopt the Immigration Judge's decision.

II. DEPORTABILITY

A. ORDER TO SHOW CAUSE

Initially, in *Matter of Raqueno*, 17 I&N Dec. 10 (BIA 1979), *aff'd*, 663 F.2d 555 (5th Cir. 1981), we noted that an Order to Show Cause is designed to inform an alien of charges against him with sufficient precision to allow him to properly defend himself. *See also Matter of Chery and Hasan*, 15 I&N Dec. 380 (BIA 1975). We find that the Order to Show Cause issued in this case was sufficient in that regard. There is no need, under the statute or the regulations, for allegations in Order to Show Cause to include the specific statutory subdivision as it relates to the definition of an aggravated felony in order to support the charge of deportability under section 241(a)(2)(A)(iii) of the Act.[1] The respondent was advised that the government believed that a conviction and sentence had been entered against him. If this information were erroneously stated, then the respondent had notice to allow him to contest the Service's position. The respondent was also advised that the conviction and sentence were being used to support the charge of deportability. Moreover, the respondent was advised by the charge of deportability that the government believed that the conviction was

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[1] The respondent relies on section 239(a)(1)(D) of the Act, 8 U.S.C. 1229(a)(1)(D), in support of his argument that the Order to Show Cause is defective. However, this particular section pertains to removal proceedings. Since the respondent is in deportation proceedings, this provision is not applicable.

an aggravated felony as defined under section 101(a)(43) of the Act. We do not find that the Order to Show Cause in this case was vague.

B. AGGRAVATED FELONY

The definition of an aggravated felony is set forth at section 101(a)(43) of the Act. In this case, the focus is on subsection (J) of the Act, which was introduced to the definition of aggravated felony by section 222(a) of the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305, 4321-22. At the time the respondent was placed in deportation proceedings, subsection (J) provided that "an offense described in section 1962 of title 18, United States Code (relating to racketeer influenced corrupt organizations) for which a sentence of 5 years' imprisonment or more may be imposed" was an aggravated felony. However, while his case was pending before the Immigration Judge, subsection (J) was twice amended. First section 440(e) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), inserted "an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses)" into the definition of an aggravated felony. Subsequently, section 321(a) of the Illegal Immigration and Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-627 ("IIRIRA"), removed the sentence of 5 years' imprisonment for a sentence of 1 year imprisonment or more may be imposed.

At the time the Order to Show Cause was filed, subsection (J) was only applicable to convictions entered on or after October 25, 1994. *See* section 222(b) of the Immigration and Nationality Technical Corrections Act

of 1994. However, as we noted in *Matter of Batista*, Interim Decision 3321 (BIA 1997), section 321(b) of IIRIRA expanded the scope of the aggravated felony definition by providing "[n]otwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph." Moreover, the amendments made by section 321(a) and (b) of IIRIRA apply to "actions taken" on or after April 1, 1997, regardless of the date of the conviction. *See* section 321(c) of IIRIRA. We find that the Immigration Judge's decision and this Board's consideration of that decision constitutes an "action" within the meaning of section 321(c) of IIRIRA. *See Choeum v. INS*, 129 F.3d 29 (1st Cir. 1997); *Valderrama-Fonseca v. INS*, 116 F.3d 853 (9th Cir. 1997); *Matter of Batista, supra.* Therefore, contrary to the respondent's arguments that section 321(a) of IIRIRA should be applied prospectively, we find that he is subject to the current definition of the term aggravated felony, and that the Immigration Judge properly found him deportable.

III. WAIVER OF INADMISSIBILITY PURSUANT TO SECTION 212(C)

The respondent sought relief from deportation under section 212(c) of the Act. However, he is statutorily ineligible for such relief as an "alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)." *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214

("AEDPA") § 440(d); *Matter of Soriano*, Interim Decision 3289 (BIA 1996; A.G. 1997).

The respondent urges this Board to apply the approach adopted in *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998) (restrictions on section 212(c) relief added by AEDPA do not apply retroactively to applications pending on April 24, 1996), or the approaches taken by several district courts. *See Yesil v. Reno*, 973 F. Supp. 372 (S.D.N.Y. July 1997); *Mojica v. Reno*, 970 F. Supp. 130 (E.D.N.Y. July 3, 1997). However, this case arises out of the United States Court of Appeals for the Fifth Circuit, and the authority from one circuit is not binding in another. *See Matter of Cerna*, 20 I&N 399 (BIA 1991). Morever, the Board is not bound to follow the published decisions of a United States district court. *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

The respondent also argues on appeal that AEDPA violates the Constitution. We cannot rule on the constitutionality of laws enacted by Congress. *See, e.g., Matter of Fuentes-Campos*, Interim Decision 3318 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992).

IV. WITHHOLDING OF DEPORTATION

Regarding withholding of deportation, we note that the respondent's aggravated felony conviction is presumed to be a particularly serious crime, which may render him ineligible for withholding of deportation. *Matter of O-T-M-T-*, Interim Decision 3300 (BIA 1996). The Board also held, however, to overcome this presumption it must be determined whether there is an unusual aspect of the alien's particular aggravated felony conviction that convincingly evidences that his or her crime cannot rationally be deemed "particularly serious" in light of our treaty obligations under the

Protocol. *Id.* To make this determination, we look to the conviction records and sentencing information in the alien's case. In this analysis, we do not engage in the retrial of the alien's criminal case or go behind the record of conviction to determine his or her innocence or guilt. We look to the nature and circumstances of the crime to determine whether the alien, having been convicted of that crime, can be said to represent a danger to the community of the United States. *Id.*; *see, e.g.*, *Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986), at 360-61; *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982). Furthermore, in this examination, one must give significant weight to the decision of Congress to include that particular category of crime in the aggravated felony definition.

The record of conviction in this case reveals that the respondent was convicted of conspiracy to participate in a racketeering enterprise, and receive a 48-month prison sentence. The indictment and presentence report reveal that the respondent redistributed cocaine for an enterprise which was promoting and facilitating the importation, acquisition, possession and distribution of cocaine. Specifically, the respondent acted as a drug dealer for an 18-month period (August 1987—March 1989). The respondent received between 1 to 15 kilos of cocaine weekly from his supplier to be redistributed primarily to customers on the University of Texas' campus. During this time period, the respondent was using cocaine.

Although an FBI and DEA agent testified that the respondent cooperated with their investigation and provided testimony against other individuals, the Board has noted the serious problems this country faces due to the sale and consumption of such illegal

substances. We have also noted that the seriousness of these crimes has been consistently recognized by Congress. *Matter of Burbano*, 20 I&N Dec. 872 (BIA 1994); *Matter of O-M-*, 20 I&N Dec. 327 (BIA 1991). We recognize the testimony of the two law enforcement agent [*sic*] that the respondent's participation in the enterprise was very minor. Nevertheless, we find that this does not discount the fact that the respondent redistributed a large amount of cocaine during an 18-month period. We find that his role as a drug dealer is a very serious crime. Thus, in the final analysis, we do not find any particular aspect of the respondent's case that would cause us to conclude that he does not pose a danger to the community and that this denial of withholding of deportation would cause us to be out of compliance with the Protocol.

V. SUMMARY

In sum, we find that the Order to Show Cause provided the respondent with sufficient notice to allow him to properly defend himself. We further find that the Immigration Judge properly concluded that the respondent is deportable as an alien convicted of an aggravated felony as defined in section 101(a)(43)(J) of the Act. *See* section 241 (a)(2)(A)(iii) of the Act. Finally, we find that the Immigration Judge properly pretermitted the respondent's requests to apply for section 212(c) relief and withholding of deportation.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/ LAUREN R. MATHON
LAUREN R. MATHON
FOR THE BOARD